

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JACOB JAMES NANCE,

Defendant-Appellant.

UNPUBLISHED

December 22, 2005

No. 257266

Oakland Circuit Court

LC No. 2004-195113-FH

Before: Whitbeck, C.J., and Talbot and Murray, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of involuntary manslaughter, MCL 750.321, and sentenced to 12-1/2 to 30 years' imprisonment. He appeals as of right. We affirm.

Defendant's conviction arises from the beating death of Steve Pomorski. On January 4, 2004, at approximately 2:30 a.m., several people left the Overtyme bar in Waterford and proceeded to the nearby home of Scott Moore to continue drinking and socializing. Amy Motherman¹ attended the party with two of her uncles and Angie Davison. Motherman testified that there was a crowd at Moore's house. Guests were consuming alcohol, and some were openly using cocaine. Motherman met the victim outside of Moore's house and talked to him for a period of time before giving him her telephone number.

During the party, the victim engaged in a verbal altercation with defendant. Steven Ball, one of Motherman's uncles, subsequently overheard defendant indicating that he wanted to "kick" the victim's "ass." At trial, defendant admitted that he argued with the victim at the party. Their argument began when defendant changed the music on a CD player. There was tension at the party after that time, and some of the guests left.

Motherman and Davison left the party at one point and went to a nearby restaurant. When they returned, the party was nearing its end. The victim was still present, but defendant had left. Davison, who was very intoxicated, wanted to see defendant. She telephoned him and asked him to return to Moore's house. Defendant, accompanied by Ross Oliver, did so.

¹ Amy's name is cited as both Motherman and Smotherman in the transcripts. When asked to spell her last name at trial, she spelled it as Motherman.

Motherman was upset by this. She wanted to go home and take Davison with her. Motherman and Oliver argued about her desire to leave with Davison, and defendant joined the argument. He called Motherman derogatory terms, prompting her to leave Moore's house alone and return to the car.

The victim approached Motherman outside and wanted to get into the car with her. She refused to allow him to do so. She then began backing out of Moore's driveway. At that point, Davison ran out of the house and came to the car. Defendant and Oliver exited the house after Davison. As they walked away from the house, they came upon the victim standing outside. From the car, Motherman observed the victim's mouth moving while he stood near defendant. Motherman then saw defendant strike the victim in the left eye. The blow appeared very hard. The victim fell over, hitting the back of his head on the pavement. Motherman testified that, before defendant struck the victim, the victim did not move any part of his body. He did not swing his arms at defendant or act as if he planned to hit him. After defendant struck the victim, he and Oliver drove quickly away.

The victim died four days later at Pontiac Osteopathic Hospital. Defendant's punch caused fractures to the bones forming the victim's left eye socket. While those injuries were not fatal, the victim's fall to the ground caused a linear fracture to his skull, which in turn caused dramatic brain swelling. The impact actually shoved the victim's brain stem through the opening at the bottom of his skull. The victim was found to have an extraordinarily high blood alcohol content after his injury, and cocaine was detected in his urine. Neither condition, however, contributed to the manner, mechanism, or cause of his death.

Defendant claimed self-defense, arguing that the victim swung at him first, that he did not intend to kill the victim, and that he just wanted to prevent the victim from harming him first. The jury convicted defendant as charged.

I

Defendant argues that the prosecutor's misconduct deprived him of a fair and impartial trial. The alleged claims of prosecutorial misconduct are not preserved because objections to the challenged conduct were not made at trial. We review the claims for plain error. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001), citing *People v Carines*, 460 Mich 750, 752-753, 763; 597 NW2d 130 (1999).

To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. "It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." [*Carines*, *supra* at 763 (citations omitted).]

No error requiring reversal will be found if the prejudicial effect of the prosecutor's conduct could have been cured by a timely instruction. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Defendant first claims that the prosecutor violated hearsay rules and acted unfairly when he both introduced an out-of-court statement at trial and argued that the statement was proof of guilt. At trial, defendant called his friend Jason Blevins to testify that defendant was intoxicated at the party but was getting along with everyone. Blevins further testified that defendant's demeanor did not change after his verbal altercation with the victim. On cross-examination, the prosecutor challenged Blevins' direct examination testimony regarding defendant's demeanor at the party. The prosecutor questioned Blevins about whether he had previously informed the prosecutor that defendant was angry after his confrontation with the victim. Blevins denied that he previously told the prosecutor that defendant was angry after arguing with the victim. The cross-examination about Blevins' prior statement to the prosecutor subsequently evolved into the following dialogue:

Q. And you said that you and Joe said to let it [the argument] go, right?

A. Yes.

Q. To let it go?

A. Yes.

Q. Because he [defendant] was hanging on to it, wasn't it [sic]?

A. Probably just to let it go, leave it alone.

Q. Listen to my question. You said to let it go because he was hanging on to it, right?

A. As far as hanging on to what, what do you mean?

Q. That he, his altercation with Steve Pomorski?

A. When he came up and said he was having an altercation we said, just let it go. We're at a party we're having a good time.

Q. Because he was hanging on to the fact that he had had an altercation, right, it was bugging him, right?

A. Oh, if you want to say that, yes, I guess.

Q. He was angry, right?

A. Not like you're trying to make it out to be, no.

Q. I'm just using the word angry, that's all I'm saying. He was angry, right?

A. Okay, then, he was angry, not like that, though.

Q. Not like what?

A. Just all he said was they were having an altercation. It wasn't like he come up and he was, screaming at us or nothing about it.

Q. But he didn't like the fact that this guy was bugging him, did he?

A. Of course not, no.

Q. That's why he came up to you and Joe, wasn't it?

A. You could say that, yes.

Q. And the fact was that you were kind of concerned that something was going to happen weren't you?

A. Well, not really.

Blevins subsequently admitted that he had previously told the prosecutor that there was tension at the party.

During closing argument, the prosecutor argued that Blevins had admitted that defendant was angry because the victim bothered him. The prosecutor argued to the jury that it had taken Blevins several minutes at trial to admit that defendant was angry. On rebuttal, the prosecutor additionally argued that Blevins had testified that there was tension at the party.

Prior inconsistent statements are not hearsay because they are not offered to prove the truth of the matter asserted. *People v Hallaway*, 389 Mich 265, 275-276; 205 NW2d 451 (1973). They are offered to prove that the inconsistent statement was made for the purpose of impeaching contrary testimony from the witness stand. Evidence of a witness' prior inconsistent statement may be admitted to impeach that witness. *People v Kilbourn*, 454 Mich 677, 683; 563 NW2d 669 (1997). In this case, Blevins testified on direct examination that defendant was getting along with everyone and that his demeanor did not change after his verbal encounter with the victim. The prosecutor questioned Blevins about his alleged prior statement to cast doubt on his direct examination testimony. Blevins denied making a prior inconsistent statement that defendant was angry. Thus, he was not impeached by his prior statements in that regard. Nevertheless, the prosecutor was within his right to attempt to impeach Blevins with respect to his prior statement regarding whether defendant was angry on the night of the victim's death. When Blevins denied the statement, the prosecutor asked direct questions about defendant's demeanor or mood before the assault on the victim. The prosecutor elicited Blevins' testimony that defendant was angry. This evidence was not objectionable. Testimony related to a defendant's demeanor before the incident is admissible. *People v Medina*, 100 Mich App 358, 362; 298 NW2d 648 (1980); *People v Henderson*, 25 Mich App 28, 32; 180 NW2d 903 (1970).

The prosecutor also attempted to impeach Blevins' direct examination testimony about defendant's demeanor by questioning him about his prior statement regarding the existence of tension after defendant complained about the victim hassling him. Blevins admitted making a

prior statement to the prosecutor about the existence of tension. Thus, the prosecutor successfully impeached Blevins' credibility that defendant's demeanor did not change after he argued with the victim. Defendant's demeanor created tension. The evidence of Blevins' prior statement was admissible for impeachment purposes. *Hallaway, supra; Kilbourn, supra*.

Defendant's reliance on *People v Stanaway*, 446 Mich 643, 688-693; 521 NW2d 557 (1994), to support his claim that the cross-examination was improper is misplaced. In *Stanaway*, the Court announced a narrow rule of law, specifically that "impeachment [by a prior inconsistent statement] should be disallowed when [both] (1) the substance of the statement purportedly used to impeach the credibility of the witness is relevant to the central issue at the case, and (2) there is no other testimony from the witness for which his credibility was relevant to the case." See *Kilbourn, supra* at 683. In this case, unlike *Stanaway*, Blevins offered other testimony, apart from that related to the subject of the impeachment. He testified about the events of the evening and testified that Motherman was intoxicated. This latter issue was hotly contested at trial and was central to Motherman's credibility. The impeachment was not prohibited by the rule articulated in *Stanaway, supra*.

Defendant also argues that the prosecutor improperly used impeachment evidence as substantive evidence during closing argument. In *People v Jenkins*, 450 Mich 249, 260-262; 537 NW2d 828 (1995), the Court indicated that prior inconsistent statements are generally admissible only to challenge credibility and not as substantive evidence. We have reviewed the challenged closing argument and find that the prosecutor did not improperly use impeachment evidence as substantive evidence when he argued that Blevins had testified that defendant was angry. Blevins directly testified that defendant was, in fact, angry, although he was not screaming "or nothing." The prosecutor was entitled to argue the evidence and reasonable inferences. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

We agree with defendant, however, that the prosecutor's rebuttal argument, that Blevins testified there was tension, was improper. The prosecutor elicited on cross-examination that Blevins had previously told him that there was tension after the argument. Blevins' admission about his prior statement was impeachment testimony. Blevins did not otherwise testify that tension existed at the party. Thus, the prior inconsistent statement was admissible only to challenge credibility and not as substantive evidence. *Id.* Nevertheless, reversal is not required. *Carines, supra*. Defendant cannot demonstrate that the error in the prosecutor's argument affected the outcome of trial. *Id.* The prosecutor argued that Blevins, Ball, and Chris Heath, a defense witness, all testified about the tension. He added that "[t]here was tension and everybody wanted to get out." Heath did, in fact, testify that he left the party because of tension. Ball testified that he was scared and wanted to leave the party after hearing defendant state that he wanted to "kick" the victim's "ass." Ball's testimony supported an inference that there was tension after the argument. Clearly, there was additional evidence to support the prosecutor's argument regarding tension. Moreover, the trial court instructed the jury that the attorneys' statements and arguments were not evidence. Additionally, any prejudice could have been cured by a timely instruction upon request. *Watson, supra*. Under the circumstances, the outcome of trial was not affected by the prosecutor's rebuttal argument related to Blevins' testimony about tension at the party.

Defendant also argues that the prosecutor improperly argued facts that were not in evidence. A prosecutor may not make a statement of fact that is unsupported by the evidence.

People v Ackerman, 257 Mich App 434, 450; 669 NW2d 818 (2003). Specifically, defendant challenges the following statement:

And Chris Heath told us that he saw Jake [defendant] talking with Scott [Moore] and he said that he asked Jake that [sic] were you guys talking about, he said well, I was telling him to tell his buddy to back off. Back off or I'm going to kick his ass.

Defendant argues that Heath never testified to hearing defendant state that if the victim did not back off, defendant would “kick” his “ass.” Thus, defendant claims that the prosecutor’s argument was improper. We disagree.

We review the prosecutor’s argument in context. See, e.g., *People v Nimeth*, 236 Mich App 616, 627; 601 NW2d 393 (1999). Viewed in context, the prosecutor’s argument was supported by the evidence. *Bahoda*, *supra*. The challenged argument was immediately prefaced by the following:

And we heard Steve Ball testify. Remember Steve Ball. And he said that their -- -- he heard some words between Steve [the victim] and Jake [defendant] down on the first floor. He said that, that altercation that he heard came from like in this area someplace. And then he said he moved into here and he came into this room and he said he saw Jake talking to Scott [Moore], remember - - and he said he heard Jake say I'm going to kick this guy's ass. This guy's bothering me, I'm going to kick his ass.

Contrary to defendant’s argument, the prosecutor never claimed that Heath heard defendant say he wanted to “kick” the victim’s “ass.” Rather, the prosecutor argued that Ball overheard the statement. After recalling the testimony of Ball and Heath, the prosecutor summed up by saying, “Back off or I’m going to kick his ass.” This argument comported with the evidence at trial. The prosecutor was free to argue the evidence. *Id.*

II

Defendant next argues that he was denied the effective assistance of counsel at trial. Our review of the ineffective assistance claim is limited to errors apparent on the record because no *Ginther*² hearing was held. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). In order to prevail on a claim that counsel was ineffective, a defendant must show that counsel’s performance fell below an objective standard of reasonableness and that, but for defense counsel’s errors, there was a reasonable probability that the result of the proceeding would have been different. *Stanaway*, *supra* at 687-688. A defendant must affirmatively demonstrate that counsel’s performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). He must overcome a strong presumption that the assistance of his counsel was sound trial strategy. *Stanaway*, *supra*; *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991).

² *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973).

In this case, the prosecutor and defense counsel stipulated to admit defendant's past conviction for making a false statement in an application for a driver's license. On direct examination, defense counsel asked defendant whether he was convicted for "false statement in an application for a driver's license." Counsel then inquired whether the conviction meant that defendant had "lied under oath for his application." Defendant contends that, by asking the specific question about the prior conviction, counsel opened the door for further questioning about the crime. The prosecutor later cross-examined defendant about the details of the conduct underlying his prior conviction. Defense counsel did not object to this questioning.

On appeal, defendant does not challenge the admission of his prior conviction, counsel's decision to stipulate to the admission of that prior conviction, or the prosecutor's act of questioning defendant about the details of the conduct underlying the conviction. Rather, he argues that counsel was ineffective by opening the door to the prosecutor's further questioning. On the record before us, we cannot conclude that counsel was ineffective with respect to his handling of the prior conviction. In response to the prosecutor's cross-examination, the jury heard that defendant lied on the application because he was out of work, wanted to work, needed a license to work, and lied to secure that license. This testimony placed defendant's conviction, which was already properly before the jury, in a more positive light. It portrayed defendant as a nonviolent, prior offender whose conviction was related to an act taken to secure a job, to be a productive member of society. We are not convinced that defense counsel's conduct with respect to the prior conviction was not matter of trial strategy. Matters of trial strategy will not be second-guessed. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Moreover, defendant has failed to demonstrate that, but for defense counsel's failure to object to the prosecutor's questioning, the outcome of trial would have been different. *Stanaway, supra*.

Additionally, we reject defendant's argument that he was denied the effective assistance of counsel where his counsel failed to request CJI2d 4.5(1),³ the limiting instruction related to impeachment evidence. We agree with defendant that competent counsel would have requested the instruction. The prosecutor attempted to, and succeeded in part, in impeaching Blevins with his prior inconsistent statement regarding defendant's demeanor at the party following the argument. Defendant has met his burden of proof that counsel's performance fell below an objective standard of reasonableness. *Stanaway, supra*. However, defendant is not only required to show that his counsel's performance was deficient. He is also required to show that his counsel's errors were so serious as to deprive him of "a fair trial, a trial whose result is reliable." *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). Defendant is required to demonstrate that, but for his counsel's failure to request the instruction, the outcome of trial

³ CJI2d 4.5(1) provides:

If you believe that a witness previously made a statement inconsistent with [his] testimony at this trial, the only purpose for which that earlier statement can be considered by you is in deciding whether the witness testified truthfully in court. The earlier statement is not evidence that what the witness said earlier is true.

would have been different. *Stanaway, supra*. Defendant has not met this latter burden of proof. Regardless of Blevins' impeachment with respect to defendant's demeanor at the party, there was ample evidence that defendant argued with the victim, that defendant thereafter made the statement that he wanted to harm the victim, and that there was tension after the argument. Thus, even if the evidence of Blevins' prior inconsistent statement was limited by CJI2d 4.5(1), there was evidence of a similar nature, which was argued by the prosecutor, to support his theory of the case. On the record before us, we are satisfied that the failure to request the limiting instruction did not deprive defendant of a fair trial.

We note that defendant also requests a remand for a *Ginther* hearing to explore the issues of alleged ineffective assistance of counsel. MCR 7.211(C)(1)(a). This request is not only untimely, MCR 7.211(C)(1)(a), but defendant has not set forth, by affidavit or offer of proof, additional facts that would be established at a hearing if one was held. MCR 7.211(C)(1)(a)(ii). We deny the request for a *Ginther* hearing.

III

Defendant finally argues that the trial court improperly scored offense variable (OV) 3 of the sentencing guidelines, MCL 777.33, at ten points. He argues that, where the sentencing offense is a homicide, zero points must be scored for OV 3 as a matter of law. The alleged scoring error is not preserved for review because it was not raised at sentencing, in a proper motion for resentencing, or in a motion to remand filed in this Court. MCL 769.34(10). However, because defendant argues that the error resulted in a sentence outside the appropriate guidelines range, we review the issue for plain error. *People v Kimble*, 470 Mich 305, 310-314; 684 NW2d 669 (2004). Defendant must show that a clear or obvious error affected his substantial rights. *Id.*

MCL 777.33 provides in relevant part:

(1) Offense variable 3 is physical injury to a victim. Score offense variable 3 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points

One hundred points should be scored if the victim was killed, MCL 777.33(1)(a), unless the sentencing offense is a homicide, MCL 777.33(2)(b). Ten points should be scored if there is bodily injury requiring medical treatment. MCL 777.33(1)(d). Zero points should be scored if no physical injury occurred to the victim. MCL 777.33(1)(f).

Our Supreme Court recently rejected the precise argument made by defendant in this case. In *People v Houston*, 473 Mich 399, 405-408; 702 NW2d 530 (2005), the Court held that zero points should be assessed under OV 3 "only when '[n]o physical injury occurred to a victim.'" Where physical injury occurs, and the sentencing offense is a homicide, a score of ten or twenty-five points is appropriate. *Id.* In this case, there was no dispute that physical injury occurred to the victim. When defendant punched the victim in his left eye, he shattered the bones comprising the eye socket. Therefore, a score of zero points would have been inappropriate. *Id.* Further, because there was a bodily injury requiring medical treatment, the score of ten points was proper. MCL 777.33(1)(d).

Affirmed.

/s/ William C. Whitbeck

/s/ Michael J. Talbot

/s/ Christopher M. Murray